Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

No. 78-516

In the Supreme Court of the United States

OCTOBER TERM, 1978

BORDEN, INC., PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. a-3 to a-19) is reported at 544 F.2d 312. The opinion of the district court on remand (Pet. App. a-19 to a-23) is unreported. The opinion of the court of appeals on appeal from the decision on remand (Pet. App. a-24 to a-27) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. a-28) was entered on April 20, 1978. A petition for rehearing was denied on June 30, 1978 (Pet. App. a-29). The petition for a writ of certiorari was filed on September 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals failed to apply the law of the case.
2. Whether the court of appeals properly remanded the case to the Secretary of Agriculture for further proceedings on the issue of damages.

STATEMENT

1. Prior to September 1970, petitioner operated a milk processing plant in Des Moines, Iowa, and a second plant in Rock Island, Illinois. The first plant was subject to the Department of Agriculture's "Des Moines Milk Marketing Order," while the second plant was subject to the Department's "Quad Cities—Dubuque Milk Marketing Order."[1] Under the terms of the two orders, each processing plant was governed by the order applicable to the area in which it distributed most of its milk (Pet. App. a-4).

[1] The Agricultural Adjustment Act of 1933, 7 U.S.C. 601 *et seq.*, provides for the Secretary of Agriculture to issue milk marketing orders for various regions of the country. The marketing orders establish the minimum prices at which milk handlers, such as petitioner, may buy milk from milk producers (dairymen). The milk marketing orders are intended to stabilize the milk production market throughout the country.

On September 1, 1970, petitioner closed its Rock Island plant and began serving customers in the Quad Cities—Dubuque area from its Des Moines plant. As a result of this change, the Des Moines plant began distributing most of its milk in the Quad Cities—Dubuque area and thus became subject to the milk marketing order for that area. At that time the minimum price set for Class I milk was 15 cents per hundredweight lower under the Quad Cities—Dubuque order than under the Des Moines order. In addition, the Quad Cities—Dubuque order provided that the minimum price for Class I milk would be reduced for handlers, such as petitioner, who were located at a distance of more than 70 miles from the center of the marketing area. Under the formula set out in the Quad Cities—Dubuque order, the minimum price at which petitioner was permitted to buy milk was reduced by 19 cents per hundredweight because of the distance of petitioner's Des Moines plant from the Quad Cities—Dubuque marketing area (Pet. App. a-4 to a-5).

Accordingly, because of the 15 cent price disparity between the two areas and the 19 cent distance discount that petitioner enjoyed under the Quad Cities—Dubuque order, petitioner was able to purchase milk at a minimum price 34 cents per hundredweight lower than the price applicable to other milk handlers

located in Des Moines but subject to the Des Moines order. With respect to the milk it sold in the Des Moines area, however, petitioner voluntarily agreed to pay the same price as other Des Moines area milk handlers, so it enjoyed no competitive advantage in that area (Pet. App. a-5 to a-6).

On request of a local dairy cooperative, the Secretary of Agriculture in late 1970 and early 1971 issued a series of three orders amending the Quad Cities—Dubuque Milk Marketing Order. In effect, the amendments eliminated the 34 cent price differential enjoyed by petitioner by virtue of its being governed by the Quad Cities—Dubuque order rather than the Des Moines order (Pet. App. a-6 to a-8).[2]

2. After unsuccessfully challenging the amendments at the administrative level, petitioner filed this action in the United States District Court for the Northern District of Illinois.[3] The district court upheld the amendments, but the court of appeals reversed on the ground that the amendments were not supported by substantial evidence and were therefore unlawful (Pet. App. a-3 to a-19). With respect to

[2] On October 1, 1970, the Secretary issued an order that temporarily eliminated petitioner's 19 cent location differential (Pet. App. a-6). On October 29, 1970, the differential was permanently eliminated, and in addition petitioner was required to pay the additional 15 cent charge that handlers subject to the Des Moines order were then paying (*id.* at a-7). Finally, on April 28, 1971, the additional 15 cent charge was made permanent (*id.* at a-7 to a-8).

[3] The Agricultural Adjustment Act of 1933 specifically provides that handlers may seek judicial review of milk marketing orders. 7 U.S.C. 608c(15)(B).

damages, the court of appeals ruled that petitioner "is entitled to recover overpayments which it made pursuant to the invalid orders" (*id.* at a-18).[4] The court then remanded the case to the district court on the issue of damages, "with direction to enter judgment for [petitioner] in the amount ascertained after appropriate proceedings" (*id.* at a-19).

On remand, the district court entered judgment for petitioner in the amount of $249,978.38. The court arrived at that sum by calculating the quantity of Class I milk purchased by petitioner during the relevant period and multiplying that quantity by the excess price imposed by the invalid amendments (Pet. App. a-19 to a-20). The court did not conduct an evidentiary hearing to determine whether that amount accurately represented the difference between what petitioner had to pay for milk under the invalid amendments and what it would have paid absent the amendments.

On appeal, the Secretary challenged the formula that the district court used to calculate damages. In particular, the Secretary argued that the formula was based on the mistaken assumption that petitioner would have been able to continue buying milk at the old order price for the entire period in question. If, for economic or other reasons, petitioner would have paid more than the minimum price set by the old order, the Secretary argued, then petitioner's over-

[4] The period for which overpayments were made ended in July 1971, when petitioner closed its Des Moines processing plant (Pet. App. a-8).

payments under the invalid amendments should have been correspondingly reduced.

The court of appeals agreed with the Secretary's position. In an unpublished order, the court reversed the judgment of the district court and, because the calculation of overcharges required consideration of "complex economic relationships * * * peculiarly within the special expertise of the Secretary," ruled that these issues should be resolved in the first instance by the Secretary (Pet. App. a-27). Accordingly, the court of appeals instructed the district court to remand the case to the Secretary for the purpose of conducting an evidentiary hearing on the issue of damages.

ARGUMENT

1. Petitioner first argues (Pet. 12-15) that the court of appeals' order to remand the case to the Secretary for the purpose of conducting an evidentiary hearing on the issue of damages conflicts with the court's original decision in the case.

In its first opinion, the court of appeals held only that petitioner was "entitled to recover overpayments which it made pursuant to the invalid orders" (Pet. App. a-18) and that the amount of the overpayments should be "ascertained after appropriate proceedings" (*id.* at a-19). The court did not specify at that time what method should be used to calculate the overpayments or what factors the district court should consider in determining the amount due to petitioner. In its second opinion, the court held that the district court's method of calculating the overpayments was

improper and that, instead, the calculation of the amount due to petitioner required the consideration of "complex economic relationships between producers and handlers during the time period for which damages are sought." Contrary to petitioner's contention, there is no conflict between these two rulings.

Petitioner finds an irreconcilable conflict between the two decisions because it defines "overpayment" the way the district court did: simply as the difference between the minimum price under the old order and the minimum price under the amended order, multiplied by the quantity of milk sold during the period that the amended order was in effect. While that amount constitutes the maximum possible overpayment, it may not represent the true overpayment, as the court of appeals recognized.

The Secretary's marketing orders simply establish minimum prices at which dairies can sell their milk. Economic forces, however, often push prices above these official minimums. Accordingly, it is possible that petitioner would have had to pay increased prices for its milk even if the old marketing order had not been amended. In that event, the true amount that petitioner was overcharged by having to comply with the new marketing order would be less than the theoretical maximum overcharge that was awarded by the district court.[5]

[5] There is an additional reason why petitioner's overpayments may have been less than the district court awarded. As we have noted, when petitioner closed its Rock Island plant, it voluntarily agreed to pay Des Moines prices for milk

The court of appeals likewise did not violate the "law of the case" by instructing the district court to remand the case to the Secretary for an evidentiary hearing on the issue of damages. In its first opinion, the court of appeals instructed the district court to enter an award for damages "in the amount ascertained after appropriate proceedings" (Pet. App. a-19). The "appropriate proceedings" could, of course, have included a further remand to the Secretary if the district court had determined that such a remand was necessary. Accordingly, when the case returned to the court of appeals on the second appeal, and when the court determined that the district court's method of calculating damages was improper, it was entirely consistent with its first opinion for the court of appeals expressly to instruct the district court to remand the case to the Secretary for an evidentiary hearing, a disposition that the court of appeals indisputably had the authority to order. See 28 U.S.C. 2106. At all events, any conflict between the two decisions would be for the court of appeals to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1953).

2. Petitioner argues (Pet. 21-24) that it is automatically entitled to recoup the full difference between

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purchased for resale in the Des Moines marketing area (Pet. App. a-5 to a-6). This voluntary agreement raises two factual issues: how long the agreement would have remained in effect, and what geographic area was covered by the agreement. These issues bear directly on the amount of petitioner's overpayments under the amended marketing order.

the original and amended market order prices and that the court may not reduce that amount, even if the actual amount that petitioner was overcharged is less than that sum.

Cases involving the recovery of excessive charges occasioned by unlawful rate increases have consistently been held to be governed by normal principles of restitution. See *Atlantic Coast Line Railroad* v. *Florida*, 295 U.S. 301, 310 (1935); *Moss* v. *CAB*, 521 F.2d 298 (D.C. Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 942 n.97 (D.C. Cir. 1968), cert. denied, 393 U.S. 1081 (1969). The courts have specifically rejected the claim that a party adversely affected by unlawful rates is automatically entitled to all accounts collected in excess of the last lawful rate. See *Moss* v. *CAB*, *supra*, 521 F.2d at 307 (collecting cases). See also *Atlantic Coast Line Railroad* v. *Florida*, *supra*, 295 U.S. at 314, 318-320; *Williams* v. *Washington Metropolitan Area Transit Comm'n*, *supra*, 415 F.2d at 944 ("[T]he proper disposition on setting aside a rate increase unlawfully ordered by the Commission * * * is to be governed by the equitable considerations which apply to suits for restitution generally * * *. [I]t lies within our authority to direct restitution in an amount less than the whole sum of the increased fares collected under the invalid order * * *").

Petitioner nonetheless contends that these principles have not been applied by this Court in other contexts and that they should not be applied here. In support

of this claim, petitioner relies on cases involving reparations for excess railroad freight charges under the Interstate Commerce Act. See, *e.g.*, *Adams* v. *Mills*, 286 U.S. 397, 407 (1932); *Louisville & Nashville R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 236 (1925). In these cases, the Court held that the defendant railroads could not defeat the shippers' claims for reparations on the ground that the shippers had "passed on" the excess charges to their customers. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 490-491 n.8 (1968). The Third Circuit, in *Abbotts Dairies* v. *Butz*, 584 F.2d 12 (1978), similarly held that a milk handler's damages under an invalid milk marketing order are not subject to reduction to the extent that the milk handler may have passed the excess costs on to its customers. But the present case does not involve the question whether petitioner has suffered any ultimate financial injury as a result of the overcharges—the issue presented by the "passing-on" defense. It involves, instead, the much simpler question of what the true amount of the overcharge was in the first place. Because, as we have noted, the amount of the overcharge may be less than the difference between the invalid minimum price level and the previous valid minimum price level, further proceedings are necessary to ensure that petitioner does not receive more in restitution than it was actually overcharged.

3. Finally, petitioner contends (Pet. 15-18) that by instructing the district court to remand this case to the Secretary of Agriculture for further proceed-

ings, the court of appeals brought itself into conflict with the Third Circuit, in *Abbotts Dairies*, *supra*, and with the District of Columbia Circuit, in *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (1971).

In *Fairmont Foods*, the court of appeals remanded the case to the district court to enter judgment for the milk handler "after appropriate proceedings," just as the court of appeals did in this case. The District of Columbia Circuit did not indicate that a further remand to the Secretary would be improper if the district court considered it necessary, and it did not foreclose its own option later to order such a remand. There is thus no conflict between the decision in *Fairmont Foods* and the decision of the court of appeals in this case.

In *Abbotts Dairies*, the district court ordered the case remanded to the Secretary, but the court of appeals overturned that portion of the district court's order. The ground on which the court of appeals reversed, however, makes it clear that there is no conflict between that decision and this one. The Third Circuit concluded that, unlike the situation in the instant case, there was no need to determine the price at which Abbotts would have been able to purchase milk if the unlawful order had not been issued. The court noted that Abbotts had continued to purchase milk at the price used as a baseline for calculating damages until the day the invalid order went into effect, thus supporting the inference that it would have been able to continue purchasing milk at that price throughout the period in question. See 584 F.2d

at 20-21. Moreover, the court observed that because the order in the *Abbotts Dairies* case affected all milk producers and handlers in the marketing area, determining what the milk prices would have been absent the unlawful order would be extremely difficult. *Id.* at 21. Here, by contrast, the invalid order affected only petitioner, thus making the economic determinations more feasible. Finally, the Third Circuit, concerned with the protracted nature of the litigation in the *Abbotts Dairies* case, determined as a matter of discretion that a remand to the Secretary would add unnecessarily to the delay in reaching a final judgment. That the court of appeals chose to exercise its discretion in this case to remand the case to the Secretary instead of confining further proceedings to the district court does not bring the two decisions into conflict and does not raise a question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979

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